Supreme Court, U. S.
FILED
MAR 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1244

HENRY J. WADDELL,
Petitioner,

vs.

PEPSI COLA COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner, Henry J. Waddell, respectfully prays that a writ of certiorari issue to review the order, District of Columbia Court of Appeals, filed in this proceeding on October 7, 1977, and orders denying petitioner's request for reconsideration and hearing *en banc.* (See Appendix, pp. 2).

OPINION BELOW

The D.C. Court of Appeals, by order dated October 7, 1977, (Appendix 1), dismissed petitioner's appeal and, by

order dated January 5, 1978, Appendix 2, denied petitioner's petition for reconsideration and hearing *en banc.*

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257, as amended to July 29, 1970, Public Law 91-358, Title 1, Section 172(a), 84 Stat. 590. The ORDER of the Appellate Court was entered on October 7, 1977 (Appendix p. 1) and a petition for reconsideration and hearing *en banc* was timely filed and denied on January 5, 1978 (see Appendix pp. 2):

"On consideration of appellant's petition for hearing *en banc*, it is

ORDERED that appellant's petition is denied."

QUESTION PRESENTED

Does an Appellate Court have jurisdiction of a case on an untimely, improper and invalid notice of appeal, when there has been no judgment or final order entered by the trial court?

STATEMENT OF THE CASE

Petitioner lost part of his right index finger in an automobile collision on April 30, 1969. The facts of the accident and the manner in which petitioner was injured were stipulated to and incorporated into the pretrial order. The jury returned a verdict of $12,500.00 for the petitioner on April 11, 1972.

The respondent filed a Motion for a New Trial and/or a Motion for Judgment Notwithstanding the Verdict. The trial court, denied the motion. The respondent filed an

invalid Notice of Appeal from the order denying the motion. No judgment was entered by the trial court. The appellate court entertained the Notice of Appeal and entered a judgment reversing the "judgment" of the trial court. A judgment had never been filed or entered by the trial court and the Clerk of the Court pointed this out to the trial judge and withheld the proposed order from his signature, stating that no judgment had been filed or entered on the docket and that the Notice of Appeal was from a denial of defendants Motion for Judgment N.O.V., not from a judgment, stating that there was no provision of rule or law which permitted such an appeal.

The case was assigned a new trial calendar number and set for another jury trial for October 4, 1976, with notices being sent to all parties. The respondent did not appear on the day of the trial and the petitioner filed a praecipe asking for default for his non-appearance and non-explanation. The assignment Clerk referred the matter to the Motions Calendar for a hearing. On April 8, 1977 (six months later and without a hearing and with none of the participants present) the trial judge filed an Order directing a verdict for the Respondent, quoting as its authority, the Appellate Court Judgment. Petitioner appealed, respondent filed a Motion to Dismiss the appeal or in the Alternative for Summary Affirmance. The Appellate Court dismissed petitioners appeal.

STATUTES INVOLVED

FIFTH AMENDMENT, U.S. Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "

REASONS WHY THE WRIT SHOULD BE GRANTED

Petitioner states that when the jury returned a verdict for him and the trial court did not enter a judgment on the jury verdict and the respondent filed an untimely, improper and invalid notice of appeal, petitioners rights were prejudiced. The denial of his right to appeal or to seek execution of a judgment was unconstitutional. *There was no final order, no judgment and there can be no appeal from a jury verdict or from the denial of a J.N.O.V. or New Trial Motion.*

The U.S. Supreme Court has held that a jury verdict was not a final decision for the purpose of timeliness of Appeal where there was nothing meeting the requirement of a "separate document" for a judgment under Rule 58 of the Federal Rules of Civil Procedure. Further, some Courts have disregarded the clear provision of Rule (79A) or (58) that "every judgment must be set forth on a separate document and must be entered on the docket" and have accepted appeals, but a unanimous Supreme Court repudiated these few aberrant decisions and has held it a requirement that the judgment be set forth in a separate document and must be mechanically applied in all cases. (*United States vs. Indrelunas*, 411 U.S. 216, 93 Sup. Ct. Reporter 1562).

Petitioner was denied equal treatment of the law and his property was taken without due process of law[1], and

[1] Fifth Amendment, U.S. Constitution.

that an assault was committed upon the judicial process, in which he sought relief.[2]

[2] *Snyder vs. Mass.*, 291 U.S. 97 (1934), page 105. The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental.

CONCLUSION

The Petitioner asks that the Petition For a Writ of Certiorari to the District of Columbia Court of Appeals be granted and asks that this Court *order that judgment be entered for plaintiff on the jury verdict of April 11, 1972.*

Respectfully Submitted,

WILLIAM A. BURLESON
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Washington, D.C. 20003

Attorney for Petitioner

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

[Filed Jan. 5, 1978]

No. 12230 JANUARY TERM, 1978

HENRY J. WADDELL, Appellant,

v. **CA 22207-70**

PEPSI COLA COMPANY, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, *Gallagher, Nebeker, *Yeagley, Harris, Mack, and Ferren, Associate Judges; and *Pair, Associate Judge, Retired.

ORDER

On consideration of appellant's petition for reconsideration and rehearing *en banc*, and it appearing that no judge of this Court has called for a vote thereon, it is

ORDERED that the *en banc* petition is denied; and it is

FURTHER ORDERED by the merits division that the petition for reconsideration is denied.

PER CURIAM.

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* Denotes merits division

Copies to:

Honorable Orman W. Ketcham
Clerk, Superior Court

William A. Burleson, Esquire
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APPENDIX

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed October 7, 1977]

No. 12230 JANUARY TERM, 1977

HENRY J. WADDELL, Appellant,

v.

CA 22207-70

PEPSI COLA COMPANY, Appellee.

BEFORE: Gallagher and Yeagley, Associate Judges, and Pair, Associate Judge, Retired.

ORDER

The Court has pending appellee's motion to dismiss and the pleadings filed with respect thereto. Upon consideration thereof and of the record on appeal and appellant's brief, it is

ORDERED that appellee's motion be granted and this cause is hereby dismissed.

PER CURIAM

Copies to:

Honorable Joyce Hens Green
Associate Judge, Superior Court of the District of Columbia

Clerk, Superior Court of the District of Columbia

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